Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 16-247

COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

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NCTA – The Internet & Television Association ("NCTA")[1] hereby submits its comments on the Public Notice in the above-captioned proceeding.[2]

INTRODUCTION AND SUMMARY

The bottom line is, by now, a foregone conclusion. The numbers and charts that we provide in these comments are practically superfluous. Vigorous, flourishing competition continues to be the hallmark of today's market for the delivery of video competition. As the Commission's annual reports have found, consumers across the nation have for years been able to choose from among several competing multichannel video programming distributors ("MVPDs"), and more than half choose one of their local cable operator's satellite or telephone company competitors.

Moreover, MVPDs are no longer consumers' only supplier of video programming other than their local over-the-air broadcast stations, nor are they the only means by which non-

[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 80 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $245 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to approximately 30 million customers.

[2] FCC, Public Notice, *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, DA 16-896 (Aug. 5, 2016).

broadcast programming can reach viewers. For tens of millions of viewers, the Internet has taken its place beside broadcasting and MVPD services as a ubiquitous source of free, subscription and pay-per-view video programming. The Internet, IP technology and Wi-Fi enable cable customers to watch the programming to which they subscribe live, recorded or on demand on a variety of retail devices – their phones, tablets, laptops and personal computers – inside and outside their homes. But they – and anyone else with a wired or wireless Internet connection – can also watch the vast array of program networks and other video content available online on those same devices, or even on their television sets.

Vertical integration between cable operators and the most popular program networks was the norm when the Commission began conducting these annual inquiries almost a quarter century ago. But the amount of such common ownership has for years been reduced to its lowest level yet – a level that poses no competitive concerns. In today's competitive MVPD marketplace – even putting aside the steady growth of the Internet as a source of, and outlet for, video programming – vertical integration is a non-issue.

This is, of course, all a far cry from the marketplace that existed when Congress enacted the Cable Consumer Protection and Competition Act of 1992 and mandated that the Commission report annually on the status of competition in the market for the delivery of video programming. At that time, cable television was generally the *only* non-broadcast video programming alternative, and, in most communities, there was but one franchised cable operator. Local telephone companies were not permitted to offer cable service, and the two national Direct Broadcast Satellite providers were just about to launch their multichannel alternatives. Congress imposed an array of regulatory measures intended to prevent cable operators from hindering the development of competition in the MVPD marketplace from these nascent competitors and in the video programming marketplace from non-cable-owned program networks.

But Congress made clear at the outset that competition was the goal and that regulation was meant only to be a stop-gap measure until competition took hold:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and development of a competitive marketplace to regulation. The Committee also recognizes, however, that *until true competition develops*, some tough yet fair and flexible regulatory measures are needed.[3]

That was the point of requiring annual reports on the status of competition – not simply to create a database of industry statistics, but to determine when and whether true competition has obviated the need for regulation. And, as the annual reports have made clear, that tipping point occurred long ago.

Now that the data, year after year, consistently confirms that the video marketplace is vibrantly and irreversibly competitive, the annual inquiry has become a routine matter. It's now initiated by a Public Notice instead of a Notice of Inquiry, and the Report is completed and issued, on delegated authority, by the Media Bureau without even being considered by the full Commission. But simply taking these repetitive reports off the Commission's agenda misses the point: The development of true marketplace competition means that a great many regulatory measures are no longer needed and should, if anything, be curtailed.

Once a marketplace becomes competitive, regulations designed to protect consumers from abuse of market power or to boost the viability of new entrants no longer serve a procompetitive purpose. In a competitive marketplace, competitors – old and new – succeed or

[3] Report of the Committee on Energy and Commerce, H.R. Rep. 92-628, 102d Cong. 2d Sess. 30 (1992) ("House Report").

fail depending on the extent to which they have effectively and efficiently identified and served the needs and demands of consumers. Companies are driven by competitive forces to find the right balance of cost, quality and quantity of services offered to consumers, to innovate and take advantage of new technologies, and to respond to new competitors that rely on new and different business models.

The history of cable television in the quarter century since enactment of the 1992 Act conforms to this competitive model. Faced with competition from DBS, which used digital technology to provide more channels than most cable systems were capable of offering along with high quality audio and video, cable operators invested hundreds of billions of dollars to upgrade their systems. The resulting digital-ready systems have enabled operators to offer a wealth of new, innovative services – including, in addition to high-definition digital television, high-speed broadband Internet access service and voice-over-Internet-protocol ("VoIP") service.

High-speed broadband Internet service has, in turn, spawned a whole new way of watching video programming. And, in order to continue to compete effectively with Internet-delivered video programming, cable operators kept on innovating, offering, for example, cloud-based and whole-house DVRs, apps for watching cable services on computers and mobile devices inside and outside the home, voice-activated remote controls, and platforms such as Comcast's X1, which integrate all these offerings.

Program networks also have responded to the new competition they face from the ever-increasing number of viewing options available to consumers. For example, they are spending more on programming – especially, original and unique programming – in order to attract and retain viewers. They are also finding new ways to reach consumers, using "apps" to enable viewing on computers and mobile devices, and on "smart" TVs and TV sets connected to Internet streaming devices marketed by Roku, Amazon, Google, and others.

This is precisely the scenario – far beyond the wildest dreams of Congress and the proponents of the 1992 Act – that calls for allowing competition, rather than regulation, to govern and determine the outcomes of the video programming marketplace. Promoting competition does not mean maximizing the *number* of competitors or protecting, much less promoting, particular competitors. Where there is competition, marketplace forces determine when and whether it is efficient and beneficial to consumers for a new competitor to enter the market. And while marketplace forces can often result in pro-competitive disruption of the status quo, it does not follow that promoting disruption is itself a worthwhile or pro-competitive goal:

> There is a difference between change and disruption. Change affects everyone. Occasionally, that change can be disruptive, but not always. There are times when you come up with a breakthrough idea, but not always. The pace of change is accelerating, and your ability to make change work can be a competitive advantage. *The best organizations are always changing and adapting in pursuit of anticipating and responding [to] the marketplace. But they don't buy into the notion that the only good change is a disruptive change or pursue disruption for its own sake.*[4]

Putting a regulatory thumb on the scale to benefit particular competitors or simply to favor disruption only serves to *distort* competition. Where there is competition, marketplace forces determine whether existing or new competitors, using adaptive or disruptive technologies, will best meet the needs and interests of consumers. After all, "[c]ustomers don't necessarily value disruption . . . and sometimes they hate it." While "[c]ustomers want you to be faster,

[4] R. Pennington, "Disrupting Disruption," *Huffington Post*, July 13, 2016, http://www.huffingtonpost.com/randy-pennington/disrupting-disruption_b_7787224.html.

better, cheaper, and/or friendlier," they also often "want you to help them *avoid* disruption in their lives."[5]

Yet, the Commission – ironically, in the name of "competition, competition, competition" – persists in proposing and imposing *more* regulation to substitute for marketplace forces in the competitive video marketplace. For example, to boost the competitive viability of online services, the Commission has imposed a common carrier regulatory regime designed and intended for monopoly telephone companies that were never expected to face competition.[6] It has sought to disrupt marketplace arrangements between cable operators and program networks by imposing a regulatory "solution" to a non-existent lack of competition and innovation in the provision of navigational devices that would only undermine this goal.[7] And it is about to vote on a Notice of Proposed Rulemaking that proposes overseeing and regulating the terms of marketplace agreements between MVPDs and providers of programming in order specifically to "promote the distribution of independent and diverse programming to consumers."[8]

The right message to be taken from these annual reports and the data reported therein is not only that competition has become the defining characteristic of the video marketplace but

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5 *Id.*

6 *See* Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (subsequent history omitted).

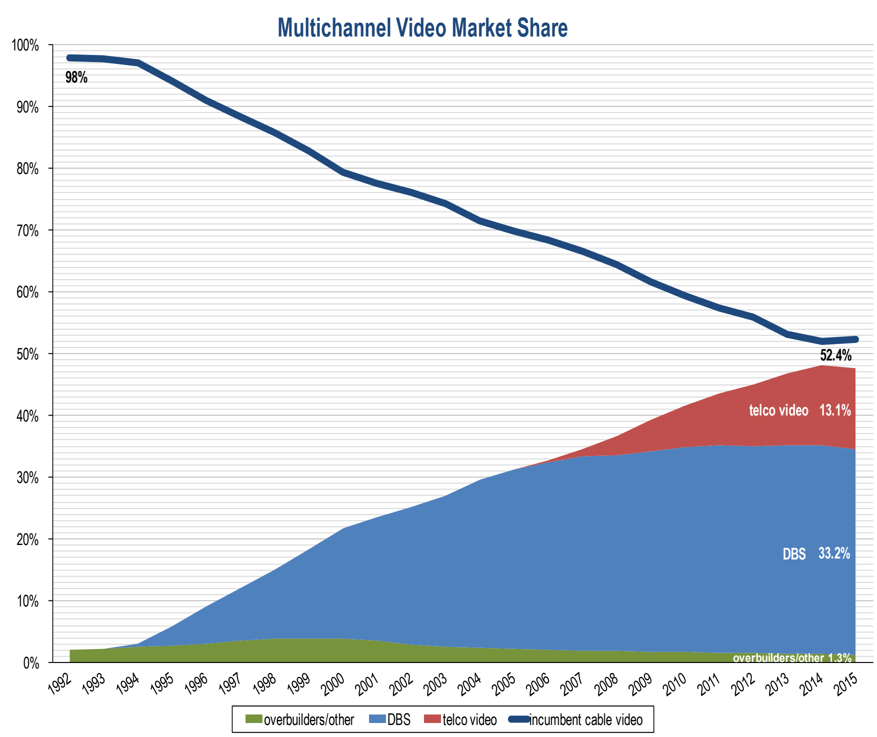
7 *See In re Expanding Consumers' Video Navigation Choices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd 1544 (2016). *See also* L. Downes, "FCC To Propose Itself As Sole TV Programmer In Latest Set-Top Box Twist," Forbes.com, Sept. 6, 2016, http://www.forbes.com/sites/larrydownes/2016/09/06/fcc-to-propose-itself-as-sole-tv-programmer-in-latest-set-top-box-twist/#27186fa47500 ("The idea was to generate more competition for set-top boxes leased from Pay TV providers. But consumers have moved increasingly to watching video over the Internet through streaming and a la carte services such as HBO Go, Netflix and SlingTV. Pay TV providers have been rushing, at least partly in response to the new competitors, to eliminate the need for any box at all.").

8 *See* FCC September 2016 Open Commission Meeting, https://www.fcc.gov/news-events/events/2016/09/september-2016-open-commission-meeting.

also that regulations designed for a marketplace lacking such competition are no longer appropriate.

I. COMPETITION CONTINUES TO FLOURISH AMONG MVPDs.

For many years now, it has been clear that the two national DBS companies, along with telephone companies (most prominently, but not exclusively, Verizon and AT&T), have brought effective competition to a marketplace in which, at the time of the 1992 Act, incumbent cable operators were most consumers' only source of multichannel, non-broadcast programming. The market shares of these groups of competitors are similar to last year's (although the shares of total households, as opposed to total *MVPD* households are slightly down for all segments): as of the fourth quarter of 2015, incumbent cable operators served 52.4% of MVPD customers (up a half a percentage point from the previous year); the two DBS companies served 33.2% (down 0.6 points); telephone companies served 13.1% (up 0.3 points); and other non-incumbent competitors (such as WOW! and RCN) served 1.3% (down 0.1%).



Competition is not concentrated in certain geographic areas of the country but is ubiquitous. As the Commission determined last year, cable operators' MVPD competitors have at least 15% market share (and often significantly more) in *each* of the 210 Designated Market Areas across the nation, warranting a rebuttable presumption that cable systems are subject to "effective competition" – the statutory test for rate deregulation.[9] Moreover, the competitors that incumbent cable operators face are not weak fledglings but are sturdy and well-established. Indeed, after the recent mergers of AT&T/DIRECTV and Charter/Time Warner Cable/Bright House, and the acquisition of Cablevision and Suddenlink by Altice, AT&T/DIRECTV serves more customers than any other MVPD, and three of the top five MVPDs (and four of the top seven) are DBS and/or telephone companies:

Video Customers - June 2016 in millions	
AT&T/DirecTV	25.3
Comcast	22.4
Charter	17.3
DISH	13.9
Verizon	4.6
Cox	4.0
Altice USA	3.6
Frontier	1.6
Mediacom	0.8
WOW!	0.5

The MVPD marketplace is unique insofar as each competitor must invest in deploying and upgrading infrastructure capable of serving an entire service area even though only a portion of households in that service area will subscribe to its services. This means that even a small number of competitors in an area will be compelled to compete fiercely to capture as many

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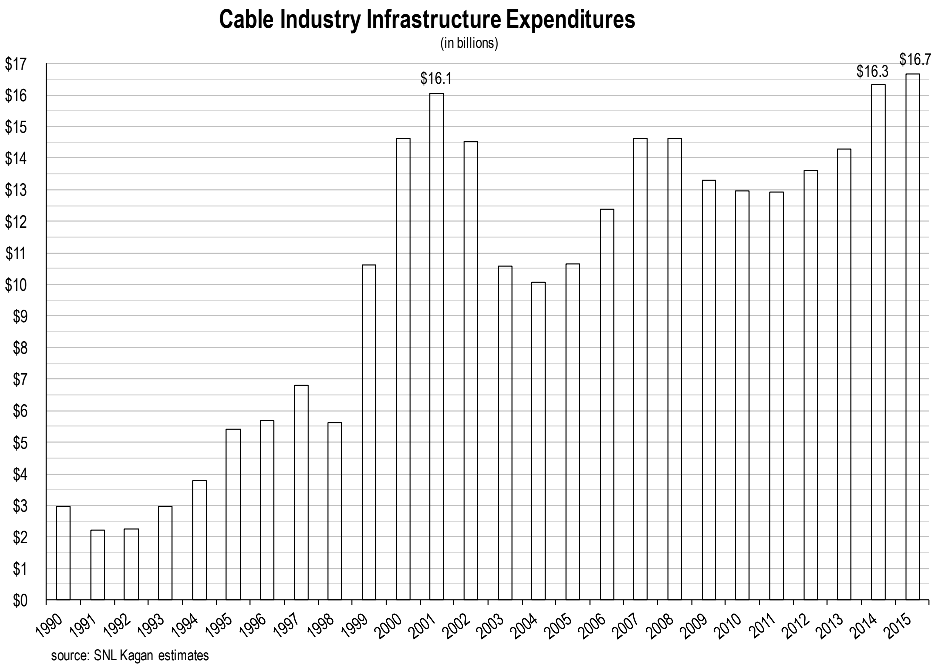
9 *See In the Matter of Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015).

customers as possible in order to recoup their sunk costs and a reasonable return on their investment.

In this high-tech business, such competition often takes the form of constant efforts to improve and add to the quality of the products and services offered to customers – not only by upgrading infrastructure and by investing in more and higher quality programming, but also by investing in research and development and adding innovative technological enhancements to the viewing experience. Cable operators (and their competitors) have, for example, constantly enhanced the ability of customers to search for and select programming, and, working together with program networks, they have offered the ability to record and watch recorded programming on any television set in the house or on computers and mobile devices. Both operators and programmers are making apps available on third-party Internet-connected devices such as Roku boxes.

These are costly investments, driven by competition, in reliance on an expectation that if they are successful in adding value to the customer experience, they will be rewarded by the marketplace. In 2015 alone, cable operators invested $16.7 billion in infrastructure upgrades to improve Internet offerings and video services – once again breaking the record set in the previous year. The industry's total investment in the past 20 years exceeds $250 billion:



II. THE INTERNET IS ENABLING THE AVAILABILITY OF MORE AND MORE COMPETITIVE PROGRAMMING CHOICES FOR CONSUMERS.

The amount of video programming available to consumers who subscribe to cable service has expanded geometrically over the years. At the time of the 1992 Act, cable systems mainly offered multiple channels of linear program networks to be viewed in real time or time-shifted using video cassette recorders. Today, the number of linear channels offered by cable systems has greatly increased, and tens of thousands of programs are also available "on demand."

But even these programming options are only a fraction of the amount of video programming now available to consumers on the Internet. Traditional program networks increasingly compete against emerging digital content networks, and it is increasingly the case that online and MVPD-delivered programming are viewed interchangeably by consumers. Thanks to innovation and upgrades by providers of broadband Internet access service, online programming can now be offered with high-definition – and even 4K – quality. And using devices provided by an array of competitive companies such as Roku, Google, Amazon, Sony, and Microsoft, consumers can watch online programming on their large, flat-screen television sets, or on their laptops, phones or tablets inside or outside their homes wherever they have Internet access.

Some consumers view online programming services as supplemental to the array of programming available on the MVPD service to which they subscribe. But others view these online services as a substitute for MVPD service, using them to piece together their own packages. Some programming available on MVPD services is also offered online to viewers, whether or not they subscribe to an MVPD service – either on the programmer's own website, or on online subscription services that offer packages of programming from various sources. Some services – such as Dish's SlingTV, Sony's PlayStation Vue, and CBS All Access – may include the entire linear lineups of participating program networks on a live or on-demand basis. Other services, such as Netflix, Seeso, Amazon Prime Video, Hulu, and YouTube Red, offer programming on demand.

But what's true of *all* these services is that they further contribute to the already substantial competitive forces that govern today's video marketplace. Whether online programming services are viewed as substitutes for, or supplements to, MVPD services, MVPDs have incentives to ensure that their services and programming are sufficient to attract and retain customers. MVPDs' revenues obviously depend on the number of households that subscribe to their services – not only their basic and enhanced basic tiers of services, but also their optional tiers and per-channel and on-demand premium services. Moreover, advertising revenues from local availabilities on cable network programming are based on viewership and therefore may be diminished to the extent that their customers watch programming on online platforms.

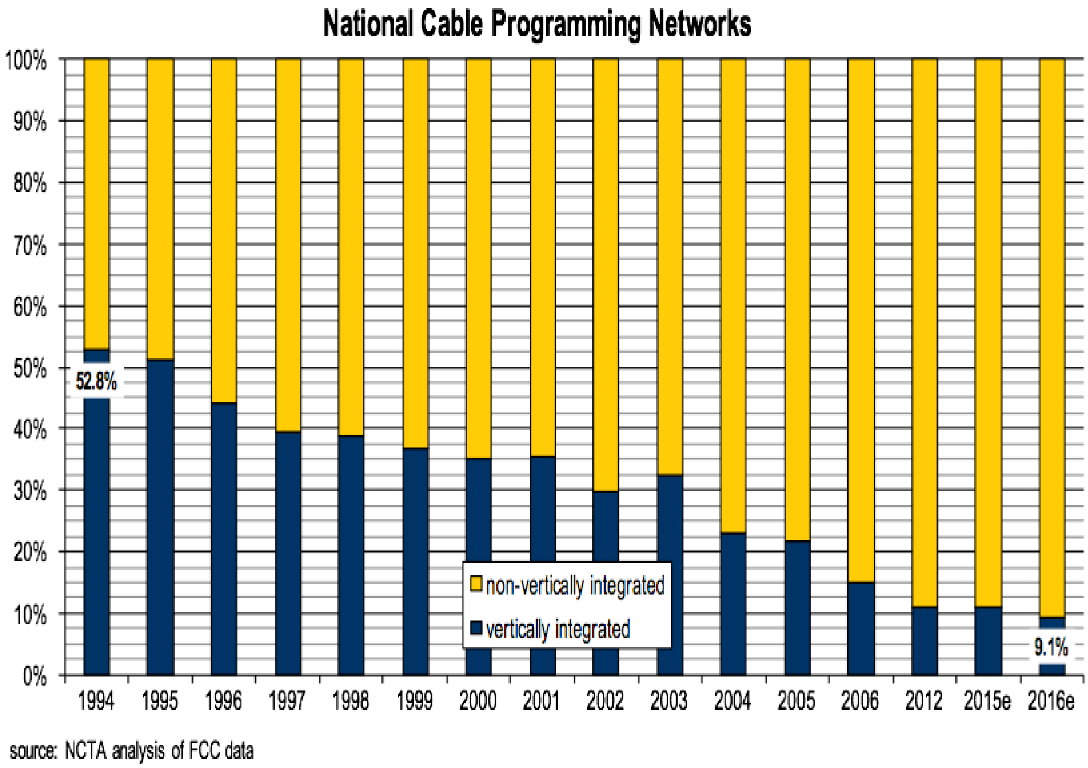
The availability of online platforms adds to the competitive outlets through which cable program networks and other program suppliers can distribute their programming to consumers, and it similarly ensures that the marketplace will remain vibrantly competitive. The quality and diversity of the programming that is reaching consumers from all these traditional and online competitive outlets is evident to anyone who has scanned the hundreds of channels on the cable guide and searched the thousands of movies and other programming available on demand, much less taken even a brief look at what's available on Netflix, Amazon Prime, YouTube and the multitude of other sources of online video programming.

From this vantage point, Congress's concern in 1992 that vertical integration between cable operators and cable program networks might pose an anticompetitive threat to the development and availability of non-cable-owned programming seems unfathomable. Indeed, as these annual reports routinely confirm, it has been an anachronism for years. In 1992, the majority of the most popular cable networks (provided on systems with a much smaller number of channels than the hundreds offered on today's digital platforms) were owned by cable operators, which seemed to potentially foreclose access to cable systems by unaffiliated networks. Today, there are more programming networks than the Commission can count and keep track of – approximately 800 by the Commission's last estimate, four years ago.[10] And only a small handful – including only one of the top 20 most viewed networks – are affiliated with cable operators.

Following the acquisition of Cablevision Systems Corporation's cable systems – but not its programming interests – by Altice N.V., the level of vertical integration has edged even

[10] *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, 8628 n.96 (2012).

lower, to barely 9% of all national networks. This historically low level poses no credible threat to fair marketplace competition:



CONCLUSION

The predicate for regulation, as Congress recognized in 1992, is a marketplace that lacks effective competition. Some forms of regulation may be designed to prevent entities with no competition from abusing their market power. Others may be designed to eliminate that market power by giving an artificial regulatory jump start to new competitors. The provisions of Title VI of the Communications Act were aimed at both.

But, as the annual reports mandated by Congress have repeatedly confirmed, that predicate no longer exists. Competition is flourishing in every corner of the video programming marketplace – competition among MVPDs, competition between MVPDs and online distributors, and competition among program networks and other suppliers of programming.

Regulatory efforts to interfere with the workings of this competitive marketplace – whether to give a boost to preferred competitors or simply to foster disruption for its own sake – are directly at odds with promoting competition. They put regulation ahead of competition in determining how the marketplace will best serve the needs, demands, and choices of the consumers of video programming.

Respectfully submitted,

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